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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PERSIO A. MALDONADO, GRACE HUTSON and JUDITH KOGAN,

Petitioners,

—v.—

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN M. HODGE, LANA R. CONNORS and the BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

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(12617)

QUESTION PRESENTED

Does the fundamental right to vote and run for office as protected by the 1st and 14th Amendments to the United States Constitution take precendence over the rigid enforcement of the technical requirement of a particular type of cover sheet on a nominating petition as required by the New York State Election Law Section 6-134?

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In the

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PERSIO A. MALDONADO, GRACE HUTSON, and JUDITH KOGAN,

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-v.-

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN M. HODGE, LANA R. CONNORS, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents

OPINIONS BELOW

The weighty question of constitutional law presented herein has been considered by the entire judicial ladder functioning in New York. All five opinions are reproduced in the Appendix hereto.

The New York State Supreme Court, New York County, found for the Respondents.

The New York State Supreme Court, Appellate Division, First Department, reversed and found for the Petitioners, thereby vindicating their fundamental 1st and 14th Amendment rights to vote and run for office.

The New York State Court of Appeals reversed again and found for the Respondents, denying Petitioners the ballot and holding that the extremely technical requirements of the New York State Election Law take priority over the fundamental 1st and 14th Amendment right to vote and run for office.

The United States District Court, Southern District of New York, and the United States Court of Appeals, Second Circuit, relying heavily on the opinion of the New York State Court of Appeals, held for the Respondents, thus denying Petitioner the ballot.

JURISDICTION

The jurisdiction of this Court to review the determination of the United States Court of Appeals, Second Circuit is conferred by 28 U.S.C. Section 1254(i).

STATUTES INVOLVED

42 U.S.C. Sec 1983 -- Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Election Law Sec. 6 - 134--Designating petitions; rules

> 1) A designating petition may designate candidates for nomination for one or more public offices or for nomination for election to one or more

party positions, or both, but designations or nominations for which the petitions are required to be filed in different offices, may not be combined in the same petition.

2) Sheets of a designating petition shall be bound together in one or more volumes. The sheets in each volume shall be numbered consecutively at the foot of each sheet, beginning with number one. There shall be a cover sheet attached to each petition consisting of ten or more sheets and each volume thereof. Each cover sheet shall indicate the office for which each designation and nomination is being made, the name and residence address of each candidate, the total number of pages comprising the petition, and the total number of signatures contained in such petition. If the petition is filed in two or more volumes, the cover sheet for each volume shall also contain the following additional information: the number of the volume, the total number of pages in the volume, the total number of signatures contained in the volume, and the numbers of the first and last pages contained therein.

3) All sheets designating the same candidate for nomination for the same public office of party position, when bound together as provided herein, and offered for filing, shall be deemed to constitute one petition for such candidate.

4) The sheets of a petition designating a candidate for an office to be filled by the voters of the entire

state shall be filed in volumes separated according to the congressional districts in which are located the residences of the greatest number of signatories on each such sheet. Within each congressional district, the sheets of such petition shall be separated according to the counties in which the greatest number of signatures were obtained. The cover sheet of the petition and each volume shall, in addition to the other information required herein for cover sheets, indicate the numbers of the congressional districts and the names of the countires contained in each volume.

5) If a voter shall sign any petition or petitions designating a greater number of candidates for public office or party position than the number of persons to be elected hereto his signatures, if they bear the same date, shall not be counted upon any petition, and if they bear different dates shall be counted in the order of their priority of date, for only so many designees as there are persons to be elected.

6) A signature made earlier than twelve weeks before the primary election shall not be counted.

7) The use of titles, initials or customary abbreviations of given names by the signers of designating petitions shall not invalidate such signatures provided that the identity of the signer as a registered voter can readily be established by a reference to the signature on the petition and that of a person whose name appears in the

registration poll legers.

8) A signer need only place his signature upon the petition and need not himself fill in the other required information.

STATEMENT

In 1981, Persio A. Maldonado, Grace Hutson and Judith Kogan had the temerity to challenge the incumbent Democratic Party leadership for the positions of Democratic Party Assembly District Male Leader, Democratic Party Assembly District Female Leader and 1st District Judicial Convention Delegate, respectively.

They collected more than the required 500 valid registered Democratic voters' signatures on their nominating petition. Respondents conceded that Petitioners' nominating petitions had a sufficient number of validly obtained bona fide signatures.

Petitioners filed their nominating petition at the very last minute, 11:58 and 11:59 p.m., on July 24, 1981, the deadline being 12:00, midnight. Their original cover sheet was defective under

New York State Election Law Section 6-134 (2) in that it did not contain the names and addresses of the District Leader and County Committee candidates. The cover sheet for Judicial Convention delegates was filed 15 minutes late.

In overruling the New York State Supreme Court, New York County, and placing Petitioners back on the ballot, the New York State Supreme Court, Appellate Division, First Department ruled 5-0 that:

> "Here it is conceded the petitions contain a sufficient number of valid and validly obtained signatures together with the requisite information as to each signature. The invalidity found consists only in certain limited deficiencies in the cover sheet. In our view, no such rigid application of the statute is mandated under the circumstances of this case. Demanding such exquisite precision in complying with the statute defeats the will of the voters who validly and properly signed the petition...
>
> "The objective of the election laws is to provide qualified voters an opportunity to designate candidates

> of their choice. The democratic process is not aided by a narrow and technical construction of election laws to defeat the will of the voters." (See Appendix B) (emphasis added)

The New York State Court of Appeals reversed the Appellate Division based solely upon their own prior rigid interpretations of the highly technical Election Law Section 6-134 (2). They did not deal with Petitioners' federal constitutional claim.

Petitioners then pressed their constitutional and federal civil rights claim (42 U.S.C. Section 1983) in the United States District Court for the Southern District of New York. Though the federal District Court denied Petitioners' claim, U.S. District Judge Kevin Thomas Duffy wrote that:

> "On a personal basis, I might agree that the state law could be viewed as arbitrary in its requirements." (See Appendix D) (emphasis added)

Judge Duffy quite correctly found

that "the right to vote in a primary election is a fundamental constitutional right" citing Smith v. Allwright, 321 U.S. 649, 660-6 (1944).

He further held that "integral to the right to vote is the right to appear on the ballot, a right which must be scrutinized under the same test of constitutionality" citing Smith v. Cherry, 489 F 2d 1098 (7th Cir. 1973), cert. den.417 U.S. 910 (1974).

After holding that Petitioners indeed do have the rights they seek to protect, the District Court erroneously concluded that the Respondents did not violate Petitioners' rights. The District Court based this judgment on the incorrect reading of this Court's opinion in Williams v. Rhodes 393 U.S. 23 (1968) and a District Court opinion in Williams v. Scalfani, 444 F. Supp. 906 (S.D.N.Y. 1978), aff'd mem. 580 F. 2d 1046 (2d Cir.

1978).

In Williams v. Rhodes, this Court, in an opinion by Mr. Justice Black, strongly disapproved of Ohio State election laws severely limiting ballot access. This Court held:

> "No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate."
> 393 U.S. at 31.

Similarly, the state statute in question here, New York Election Law Section 6-134 requiring particular types of cover sheets protects no substantial or compelling state interest. It only serves to make it easier for incumbents (the "Ins") who, by definition, are in charge of government and party administration, to keep potential electoral challengers (the "Outs") off the ballot.

In Shakman v. Democratic Organization of Cook County, 435 F 2d 67 (7th Cir. 1970), the United States Court of Appeals, Seventh Circuit recognized that "ins" and "outs" are appropriate terms for the parties in ballot access cases and that the"outs" have a constitutional right to a free and fair chance to compete with the "ins"

> "The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from inequality in election procedure." 435 F 2d at 270. (emphasis added)

The instant District Court's reliance on Williams v. Scalfani (cited above) is similarly misplaced. In that case, the court in fact held for the "outs" and ordered the challenged candidate, Valentin,

back on the ballot. The constitutional violation of the rights of the "outs" in Williams v. Scalfani involved reliance upon erroneous advice by the City Board of Elections.

Because the District Court did not find erroneous advice given by the City Board of Elections in the instant case, the Court wrongfully concluded that there was no constitutional violation. However, the court did not address the issue raised herein -- whether the challenged statute itself, as applied in this case, is unconstitutional. Certainly the Appellate Division of the State Supreme Court felt that way, 5-0, yet the District Court chose not to deal with its opinion. (See Appendices B and D)

The United States Court of Appeals, Second Circuit, in a very brief opinion specifically marked "not to be reported,

cited or otherwise used in unrelated cases," affirmed the District Court. (See Appendix E)

Clearly, on these facts, Petitioners' federal constitutional rights have been aggrieved under color of state law within the meaning of 42 U.S.C. Section 1983.

REASONS FOR GRANTING WRIT

New York is among the nation's principal cities and metropolitan areas. It is the hub of our country's commercial, cultural and diplomatic relations with the rest of the world. We have long advertised it around the globe as a showcase of democracy and we maintain the Statue of Liberty at the entrance to the City as a national symbol of free access to the ballot.

Unlike other places, the New York metropolitan area has elections scheduled every year -- from school board to city county member, from senator to political party leader to mayor, governor and president. And each and every summer the entire state court system shuts down to all other cases while the "Ins" generally successfully sue to get the "Outs" off the ballot for some arcane "violation" of New York Election Law Section

6-134 and similar sections of Articles 5 and 6 of the State Election Law pertaining to "Registration and Enrollment of Voters" and "Designation and Nomination of Candidates" respectively. Most scheduled elections are never held.

Because of New York's unique role as the nation's front door, people of all backgrounds and nationalities reside here. As such, it is an especially litigious population. State courts are very important institutions in the New York metropolitan area because of the extremely heavy volume of bitterly contested commercial, matrimonial and criminal cases generated here.

Despite the flood of cases, every summer our courts adjourn themselves into "Special Election Terms" for the purpose of conducting full-scale trials and appeals of very arcane violations of the Election Law, as in the instant case.

Not only does this effectively shut down the judicial system to very pressing controversies where the litigants are quite ready to injure each other physically, but it completely kills the faith of the average citizen in the political process.

Despite this Court's inspiring language in Williams v. Rhodes, cited above, the average New Yorker knows that a citizen must be one of the "ins" to be on the ballot here.

Some examples follow:

-Strict compliance, not substantial compliance with statutory requirements governing form of nominating petitions must be observed. Hunter v. Compagni, 74 A.D. 2d 1000 (4th Dept. 1980)

-Incorrect listing of Assembly District invalidates nominating petititon. Roland v. Toepfer, 64 A.D. 2d 963 (2d Dept. 1978)

-Incorrect judicial district invalidates nominating petition. Kiley v. Coveney. 77 A.D. 2d 941 (2d Dept. 1980.)

-Incorrect listing of town on candidate's home address invalidates nominating petition. Finneran v. Hayduck. 45 N.Y. 2d 797 (1978)

-Uninitialed and unexplained change in number of signatures invalidates nominating petition. Berger v. Acito, 64 A.D. 2d 949 (3rd Dept. 1978)

-Failure to number pages consecutively invalidates nominating petition. Kahler v. Chemung Co. Board of Elections, 17 A.D. 2d 719 (3rd Dept. 1962)

-Failure of subscribing witness to set forth the number of signatures invalidates entire page of nominating petition. Esse v. Chiavaroli, 71 A.D. 2d 1046 (4th Dept. 1979)

Such a list could go on for many

hundreds of pages.

This kind of litigation, conducted each and every summer in New York to the exclusion of other types of cases demands review by this Court for two critical reasons:

1) The regular denial of ballot access by the New York Courts strictly enforcing the New York Election Law's rigid ballot requirements is a federal Constitutional violation of the highest magnitude. It undermines the visitor's and the citizen's faith in democracy.

2) The process, whereby those in power tie up the state court system for a significant part of each calendar year for the sole purpose of cancelling elections undermines the entire judicial system and causes other pressing judicial business to be delayed unnecessarily.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Dated: July 28, 1982

Respectfully submitted,

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